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STUDY OF THE
PUBLIC DOMAIN

TALES FROM THE PUBLIC DOMAIN

BOUND BY LAW?

TRAPPED IN A STRUGGLE SHE DIDN'T UNDERSTAND

BY DAY A FILMMAKER...



BY NIGHT SHE FOUGHT FOR **FAIR USE!**

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EACH EPISODE IN OUR LITTLE SERIES ABOUT THE ARTS WILL EXAMINE ONE PORTION OF A LEGAL BOUNDARY, A KIND OF TWILIGHT ZONE.

THIS IS THE LINE BETWEEN INTELLECTUAL PROPERTY AND THE PUBLIC DOMAIN, THE MYSTERIOUS REALM WHERE MATERIAL IS FREE FOR ALL TO USE WITHOUT PERMISSION.



OUR GUIDES, TWO OBSCURE FIGURES WHO DWELL IN THESE SHADOWS... WHOSE LIVES ARE SPENT IN AN OBSSIVE QUEST TO CHART THIS LINE, ALMOST AS IF THEY WERE CONDEMNED BY SOME GHASTLY CURSE TO BE THE MAPMAKERS OF LIMBO.



REVEAL YOURSELVES PLEASE!!





DOCUMENTARIES ARE RECORDS OF OUR CULTURE. BUT OUR CULTURE IS FULL OF ARTIFACTS PROTECTED BY INTELLECTUAL PROPERTY RIGHTS -- MUSIC, IMAGES, PHOTOGRAPHS.



FILMMAKERS ARE SOMETIMES ASKED TO CLEAR RIGHTS TO THESE CULTURAL FRAGMENTS, EVEN IF THEY APPEAR ONLY INCIDENTALLY.

"CLEARING RIGHTS" IS THE PROCESS OF FINDING THE RIGHT HOLDER, AND GETTING PERMISSION OR PAYING TO USE MATERIAL.



BUT DOCUMENTARIANS ARE NOT MERELY IN THE POSITION OF DEALING WITH OTHER PEOPLE'S RIGHTS, THEY'RE ALSO IN THE POSITION OF ASSERTING THEIR OWN -- THEY MAY WANT TO RECEIVE PAYMENT, OR PREVENT CERTAIN USES OF THEIR FOOTAGE.

HOW SHOULD THE LAW DRAW LINES BETWEEN FILMMAKERS' NEED TO PORTRAY A CULTURE FULL OF LEGALLY PROTECTED MATERIAL, AND THEIR DESIRE TO PROTECT THEIR OWN WORKS?

LET'S HEAR FROM A FILMMAKER.

MEET AKIKO...

HI! I WANTED TO MAKE A FILM
CAPTURING A DAY IN THE LIFE OF
NEW YORK.



I KNOW, NEW YORK'S SUCH
A BROAD CANVAS...



MY DOCUMENTARY
WOULD LET THE
CITY SPEAK
FOR ITSELF

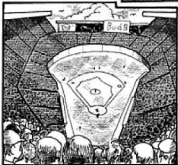


THE GAPS BETWEEN
RICH AND POOR,
THE MIX OF
"HIGH" AND "LOW"
CULTURE -- THE
HUMAN COMEDY
(OR IS IT TRAGEDY?),









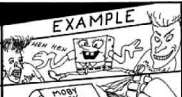


WELL, MANY WORKS PUBLISHED BETWEEN 1923 AND 1977 ARE IN THE PUBLIC DOMAIN BECAUSE THE AUTHORS DID NOT COMPLY WITH NOTICE, RENEWAL OR OTHER FORMALITIES.

BUT TRYING TO TRACK DOWN THIS INFORMATION CAN BE TIME-CONSUMING AND FRUITLESS, SO ARTISTS OFTEN HAVE TO PRESUME THESE WORKS ARE COPYRIGHTED.

DATE OF WORK CREATED 1-1-78 OR AFTER *	PROTECTED FROM WHEN THE WORK IS FIXED IN A TANGIBLE MEDIUM OF EXPRESSION
PUBLISHED BEFORE 1923	IN PUBLIC DOMAIN
PUBLISHED FROM 1923 TO 1963	WHEN PUBLISHED WITH NOTICE (WORKS PUBLISHED WITHOUT NOTICE ARE IN THE PUBLIC DOMAIN)
PUBLISHED FROM 1964 TO 1977	WHEN PUBLISHED WITH NOTICE (WORKS PUBLISHED WITHOUT NOTICE ARE IN THE PUBLIC DOMAIN)
CREATED BEFORE 1-1-78 BUT NOT PUBLISHED	1-1-78 (THE EFFECTIVE DATE OF THE 1976 COPYRIGHT ACT)
CREATED BEFORE 1-1-78 BUT PUBLISHED BETWEEN THEN AND 12-31-2002	1-1-78
CREATED BEFORE 1-1-78 AND PUBLISHED AFTER 12-31-2002	1-1-78

*WORKS PUBLISHED WITHOUT NOTICE BETWEEN 1-1-78 AND 3-1-89 RETAINED COPYRIGHT ONLY IF THE OMISSION OF NOTICE WAS CORRECTED.

TERM OF PROTECTION LIFE OF AUTHOR + 70 YEARS (FOR WORKS OF CORPORATE OR ANONYMOUS AUTHORSHIP THE SHORTER OF 95 YEARS FROM PUBLICATION OR 120 YEARS FROM CREATION)	EXAMPLE 
NONE	
95 YEARS AFTER PUBLICATION DATE; HOWEVER IF COPYRIGHT WAS NOT RENEWED, WORK IS NOW IN PUBLIC DOMAIN	
95 YEARS AFTER PUBLICATION DATE	
LIFE + 70 YEARS	
LIFE + 70 YEARS, OR 12-31-2047, WHICHEVER IS GREATER	
LIFE + 70 YEARS 	

* BASED ON PROFESSOR LOLLY GASAWAY'S CHART "WHEN U.S. WORKS PASS INTO THE PUBLIC DOMAIN."



OR A SURREALIST GARDEN
OF INTELLECTUAL
PROPERTY DELIGHTS.

FILMMAKER JON ELSE RAN INTO COPYRIGHT CLEARANCE PROBLEMS WITH "SING FASTER" - HIS DOCUMENTARY ABOUT THE STAGE HANDS' VIEW OF WAGNER'S RING CYCLE.

ELSE DOES GREAT STUFF - I LOVED "OPEN OUTCRY." WHAT KIND OF PROBLEMS?



WELL, HE NEEDED TO CUT AND REPLACE 4½ SECONDS FROM "THE SIMPSONS" THAT WERE ACCIDENTALLY CAPTURED IN ONE OF THE SCENES...

THE SIMPSONS?



STAGEHANDS WERE PLAYING CHECKERS BACKSTAGE WHILE THE OPERA WAS PERFORMED, AND A SMALL TV IN THE BACKGROUND WAS SHOWING "THE SIMPSONS." MATT GROENING DIDN'T OBJECT, BUT FOX DEMANDED \$10,000 FOR RIGHTS TO THE 4½ SECONDS!



THIS WAS CLEARLY A FAIR USE," BUT ELSE WAS TOLD FOX WOULD MAKE LITIGATING THE ISSUE DIFFICULT AND COSTLY.

HE TOOK IT OUT - EVEN THOUGH HE THOUGHT IT WAS IMPORTANT FOR THE SCENE.



WOW! SO JUST BECAUSE "THE SIMPSONS" WAS PLAYING IN THE BAR, I FILMED, I MIGHT HAVE TO PAY FOR IT?

EVEN IF I DIDN'T USE IT DELIBERATELY, AND WAS JUST TRYING TO CAPTURE "REALITY"?



FAIR USE SHOULD MEAN YOU DON'T NEED PERMISSION FOR INCIDENTALLY CAPTURED FRAGMENTS. BUT THE PRACTICE IS OFTEN DIFFERENT.



JON ELSE'S EXPERIENCE IS NOT UNIQUE.



MAD HOT
Ballroom



A CELL PHONE HAPPENED TO RING DURING THE FILMING OF MARILYN AGRELO AND AMY SEWELL'S "MAD HOT BALLROOM," A DOCUMENTARY ABOUT NEW YORK CITY KIDS IN A BALLROOM DANCING COMPETITION. THE RING TONE WAS THE "ROCKY" THEME SONG. THIS IS A VERY STRONG CASE FOR FAIR USE.



BUT EMI, WHICH OWNS THE RIGHTS TO THE "ROCKY" SONG, ASKED FOR -- GUESS HOW MUCH?



I DUNNO... HOW MUCH?

\$10,000!

IN ANOTHER SCENE, THEY WERE FILMING A FOOTBALL GAME AND ONE OF THE PLAYERS SPONTANEOUSLY YELLED "EVERYBODY DANCE NOW," A LINE FROM THE C & C MUSIC FACTORY HIT.

WARNER CHAPPELL DEMANDED \$5000 FOR USE OF THE LINE.



THEY EVENTUALLY GOT A BETTER DEAL ON THE "ROCKY" RING TONE, BUT DECIDED TO CUT THE "DANCE" LINE, EVEN THOUGH IT REALLY FIT THE MOVIE'S THEME.



IN THE FIRST YEAR, A PBS DOCUMENTARY ABOUT LOS ANGELES PUBLIC SCHOOL TEACHERS IN THEIR FIRST YEAR OF TEACHING, LED "ZEPPELIN'S STAIRWAY TO HEAVEN" CAME ON THE RADIO WHILE A TEACHER WAS DRIVING A VAN FULL OF STUDENTS TO AN OUTING.



THE TEACHER TURNED THE SONG UP AND CALLED TO THE CLASS TO LISTEN. THE STUDENTS ROLLED THEIR EYES. IT WASN'T THEIR MUSIC. IT WAS A PIVOTAL MOMENT. -A LIVE GENERATION GAP.



DAVIS GUGGENHEIM, THE FILMMAKER, WAS UNABLE TO CLEAR RIGHTS TO THE SONG AND HAD TO CUT IT OUT...



WOW, THAT'S DEMORALIZING. THERE'S A LOT OF MUSIC PLAYING IN THE BACKGROUND OF MY FILM. I DIDN'T CHOOSE TO INCLUDE IT. IT WAS JUST THERE, EVERYWHERE I FILMED.



WHAT ARE MY OPTIONS?



WELL, YOU COULD ASSERT FAIR USE AND KEEP IT IN THE FILM...



OR TRY TO FIND THE RIGHTS OWNERS AND ASK FOR PERMISSION...



OR OVERDUB IT WITH MUSIC THAT'S IN THE PUBLIC DOMAIN...



HMMM... LET'S SEE...



COULD THE SAX PLAYER IN THE SUBWAY BE PLAYING MOZART INSTEAD OF "I LOVE NEW YORK?"



REPLACE THE ROY ORBISON SONG BY THE STREET MUSICIAN WITH "OH SUSANNAH..."



AND THE DUELLING HIP HOP SONGS IN TIMES SQUARE WITH JOHN PHILLIP SOWA.



AND REPLACE THE HOT DOG VENDOR'S SINATRA WITH "YES! WE HAVE NO BANANAS..."



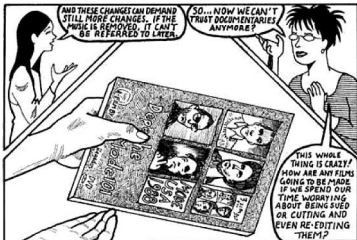
AKIKO... UM... THAT SONG WAS SET TO GO INTO THE PUBLIC DOMAIN IN 1999, BUT THEN CONGRESS EXTENDED THE TERM FOR ANOTHER 20 YEARS...



THE THING IS, THE MUSIC IS AN IMPORTANT PART OF THESE SCENES. REPLACING IT WOULD REALLY DISRUPT THE FILM.







NO, THINGS HAVE CHANGED. AND THE LAW ISN'T NECESSARILY DRIVING THIS. FAIR USE ACTUALLY PROTECTS SOME THINGS MORE CLEARLY TODAY.



BUT MANY FACTORS - NEW TECHNOLOGIES ... NEW MARKETS... HAVE CONTRIBUTED TO THE RISE OF A "RIGHTS" CULTURE



BOB DYLAN DONT LOOK BACK

A FILM BY D.A. PENNEBAKER



IF YOU WATCH THE END OF "DONT LOOK BACK," D.A. PENNEBAKER'S 1967 DOCUMENTARY ABOUT DYLAN, YOU'LL SEE THAT THERE AREN'T THE TEN MINUTES OF MUSIC CREDITS THAT YOU MIGHT SEE NOW.

WE USED TO ACCEPT THAT COPYRIGHT DIDN'T GIVE CONTROL OVER EVERY USE.



UNTIL RECENTLY NO ONE INSISTED ON PAYMENT FOR INCIDENTAL USES...



NOW A LOT OF PEOPLE THINK THE RIGHTS ARE ABSOLUTE!







AND THEN THERE ARE CRITICAL USES...

RELYING ON FAIR USE, ROBERT GREENWALD MADE EXTENSIVE USE OF FOX NEWS CLIPS IN HIS CRITICAL DOCUMENTARY "OUTFOXED."



IN A DISCUSSION OF RACISM IN THE MEDIA, "BOWLING FOR COLUMBINE" USED UNCLEARED FOOTAGE OF NEWS ANCHORS WARNING ABOUT BLACK MALE SUSPECTS.

AND NEITHER USE WAS CHALLENGED!



OUTFOXED:

Rupert Murdoch's War on Journalism

FILMMAKERS COULD CHANGE THE "RIGHTS" CULTURE BY LEARNING MORE ABOUT FAIR USE, AND EVEN MAKING SOME COLLECTIVE DECISIONS ABOUT WHAT'S FAIR.

IN FACT, SEVERAL FILMMAKERS' ORGANIZATIONS HAVE JOINTLY PRODUCED A STATEMENT OF BEST PRACTICES IN FAIR USE TO CLARIFY HOW PROFESSIONAL FILMMAKERS INTERPRET FAIR USE IN DAILY PRACTICE.



ARTISTS MAY ALSO HAVE SOME AMMUNITION AGAINST UNREASONABLE DENIALS OF FAIR USE.



MATTEL SUED ARTIST TOM FORSYTHE FOR USING TRANSFORMED IMAGES OF BARBIE DOLLS.



THE COURT FOUND THAT THIS WORK WAS A PARODY -- ONE KIND OF FAIR USE.



SO FORSYTHE COULD MAKE IMAGES LIKE...



MARGARITA BARBIE

OR

"LAND OF MILK AND BARBIE!"



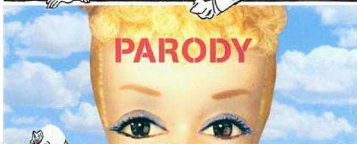
IN FACT, A JUDGE IN THIS CASE SAID THAT MATTEL'S LAWSUIT WAS...



"OBJECTIVELY UNREASONABLE AND FRIVOLOUS,"

AND EVEN AWARDED FORSYTHE SUBSTANTIAL ATTORNEYS' FEES.







IRONICALLY, ONE REASON LICENSING FEES ARE GOING UP IS THE INCREASING POPULARITY OF DOCUMENTARIES AND NEW MARKETS FOR ARCHIVAL FOOTAGE. THE MAKERS OF PROFITABLE DOCUMENTARIES ABOUT MARILYN MONROE OR THE NORMANDY LANDINGS MIGHT BE ABLE TO AFFORD HIGHER FEES.

BUT THEN WE TRANSFER THIS "PAYAS YOU GO" ATTITUDE TO LESS COMMERCIALLY ATTRACTIVE FILMS ABOUT PUBLIC SCHOOL REFORM OR MENTAL INSTITUTIONS.



SOMETIMES CULTURAL HEROES GET IN ON THE ACTION. THE MARTIN LUTHER KING, JR. ESTATE HAS AGGRESSIVELY ASSERTED COPYRIGHT OVER DR. KING'S SPEECHES, PHOTOS AND INTERVIEWS. THIS CREATED ENORMOUS OBSTACLES FOR DOCUMENTARIES SUCH AS ORLANDO BAGWELL'S "CITIZEN KING."

ONE CAN UNDERSTAND WANTING TO PROTECT DR. KING.

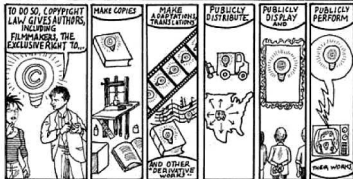
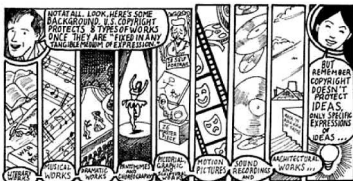
BUT ANY RULES THAT APPLY TO MARTIN LUTHER KING WILL ALSO APPLY TO DAVID DUKE.

DO WE WANT TO GIVE COPYRIGHT HOLDERS A VETO OVER HISTORY?

ORLANDO BAGWELL







EACH OF THOSE RIGHTS MEANS THAT COPYRIGHT HOLDERS CAN EXERCISE A CERTAIN KIND OF CONTROL.



THAT'S A GOOD THING, ISN'T IT?

WHAT'S GOING ON DOWN THERE?



IMAGINE IF YOU DIDN'T HAVE A COPYRIGHT IN YOUR FILM...



IF YOU SEND A COPY OF YOUR DOCUMENTARY TO PBS, WHAT'S TO STOP THEM FROM SHOWING IT WITHOUT PAYING YOU?

WHAT'S UP WITH THAT?



OR SOMEONE SELLING COPIES OF YOUR FILM ON E-BAY-- WITHOUT PAYING YOU!!



NICE FILM THERE, THUD!

NOW IT'S OURS!

HEY!

HA! HA! HA!

OR SOMEONE POSTING IT ON THE INTERNET WITHOUT YOUR PERMISSION?



OR THE NEW YORK TOURIST BOARD USING A 5-MINUTE SEGMENT OF YOUR WORK AS AN ADVERTISEMENT FOR THE CITY?

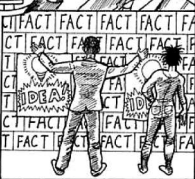
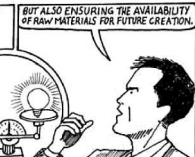


?!?!?



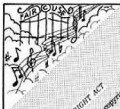






WHEN YOU'RE MAKING MOVIES, THOUGH, A LOT OF WHAT YOU ARE CAPTURING IS COPYRIGHTABLE EXPRESSION.





THE STATUTE SETS OUT FOUR FACTORS TO CONSIDER.



1976 COPYRIGHT ACT

of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

§ 107. Limitations on exclusive rights: fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

- (2) the nature of the copyrighted work;

- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

- (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

§ 108. Limitations on exclusive rights: Libraries and archives

(a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archive, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this title—

- (1) the reproduction or distribution is made without direct or indirect commercial advantage;

- (2) the reproduction or distribution is made without

- (3) the reproduction or distribution is made without

- (4) the reproduction or distribution is made without

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- (14) the reproduction or distribution is made without

- (15) the reproduction or distribution is made without

THE VINTAGE RIGHTS ACT OF 1990 (PUB. L. 101-550, 104 STAT. 525 (1990), amended Dec. 1, 1990, farther amended)

SEC. 610. EFFECTIVE DATE.

(a) Not except as provided in subsection (b), this title shall take effect 5 months after the date of the enactment of this Act.

(b) Applicability.—The rights created by section 106 of title 17, United States Code, shall apply to—



Sony v. Universal Studios (1984)
Fair use: home videotaping of television shows.

"Time-shifting," or videotaping television shows in order to watch them later, was fair use, said the Supreme Court, even though VCR users were copying the entire programs. One key reason was that the time-shifting was private and non-commercial. That meant that the film companies had to prove market harm. The Court did not believe they had done so.





Campbell v. Acuff-Rose (1994)
Fair use: a rap parody of "Pretty Woman".

The rap group 2 Live Crew made a song called "Pretty Woman" that borrowed the bass riff, much of the tune and some lyrics from Roy Orbison's "Oh, Pretty Woman." 2 Live Crew seemed to have 2 strikes against them. They used a lot of the song, and their use was "commercial." The Supreme Court said that even so, this could be fair use. They saw the song as a parody. It "juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility." Because the song was a parody, 2 Live Crew was also allowed to copy more of it – as effective parodies need to "conjure up the original."



Margaret Mitchell



USA 1



Suntrust v. Houghton Mifflin (2001)

Fair use: a parody of "Gone with the Wind" from a slave's point of view.

Author Alice Randall wrote a parody of *Gone with the Wind* criticizing its romanticized depiction of slavery and the antebellum South, and in doing so alluded to copyrighted characters and scenes from *Gone with the Wind*.



FRANKLY MY DEAR, THEY SHOULDN'T HAVE GIVEN A DAMN!



The Court of Appeals held that this could be fair use: "It is hard to imagine how Randall could have specifically criticized *Gone with the Wind* without depending heavily upon copyrighted elements of that book. A parody is a work that seeks to comment upon or criticize another work by appropriating elements of the original..."

Gerald R. Ford

A TIME TO HEAL

With a new introduction about today's America
by critics written especially for this edition



... BUT
THEY ARE!

Harper & Row v. Nation Enterprises
(1985)

Not a fair use: scooping President
Ford's memoirs.



The Nation.



Time Magazine agreed to purchase the exclusive right to print a pre-publication excerpt of ex-president Ford's autobiography. Before Time's article came out, the political magazine The Nation got an unauthorized copy of the manuscript. The Nation published its own article, which included 300-400 words from Ford's autobiography about his decision to pardon President Nixon. The Supreme Court said this was not a fair use. Why? The memoirs had not been published yet, and authors have a right to decide whether and when their work will be published. The Court found that The Nation had "effectively arrogated to itself the right of first publication" for the purpose of "scooping" Time's planned article. (Time then canceled the article.) The Court also said that the parts of Ford's book used, though small, were its "heart" – the most powerful and interesting part.



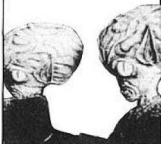


SO HOW DOES ALL THIS APPLY TO ME?

WELL, COURTS HAVE FOUND FAIR USE WHEN DOCUMENTARIES USE SHORT CLIPS IN TRANSFORMATIVE - NEW, DIFFERENT AND VALUABLE - WAYS, INSTEAD OF MERELY "RIPPING OFF" THE COPYRIGHTED MATERIAL.



HERE'S SOME EXAMPLES OF USES THAT WERE FOUND TO BE "FAIR."



ORIGINAL MOTION PICTURE SOUNDTRACKS



The documentary *Aliens Invade Hollywood* could use 3 clips totaling 48 seconds (1%) from *Invasion of the Saucer-Men* to show early film portrayals of alien visitations and government cover-ups.

THIS IS A FAIR USE - SO LONG AS YOU DON'T MENTION AREA 51!!!

DON'T WORRY MA'AM, THAT EXCEPT DIDN'T SHOW A REAL UFO... SWAMP GAS FROM A WEATHER BALLOON...

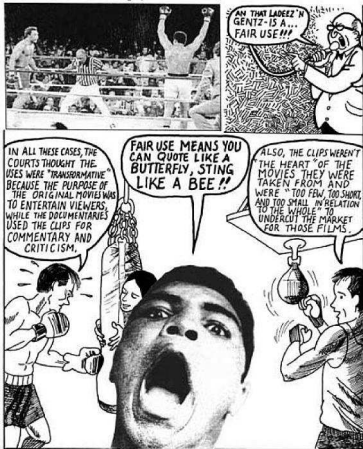
An A&E biography of Peter Graves could use 20 seconds (less than 1%) of *It Conquered the World*, which starred Graves, to show his modest beginnings in the film business.



THIS MOVIE, SHOULD YOU CHOOSE TO EXCEPT IT, WILL SELF-DESTRUCT IN 20 SECONDS!



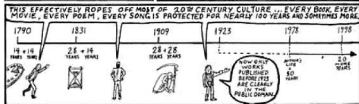
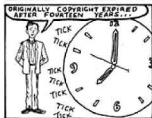
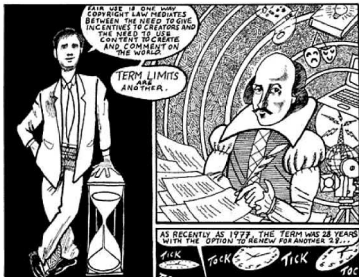
A TBS biography of Muhammad Ali could use 9-14 clips totaling between 41 seconds and 2 minutes (between .7 and 2.1%) from *When We Were Kings*, a documentary focusing on the "Rumble in the Jungle" fight in Zaire between Ali and George Foreman. (The parties disagreed about the number of clips, so the court used the 9-14 range.)





The Definitive Elvis, a 16-hour documentary that advertised its “all-encompassing” collection of Elvis appearances, used clips from *The Ed Sullivan Show*, *The Steve Allen Show*, and Elvis TV specials. The court thought that these uses went beyond biographical reference and were just rebroadcast as entertainment, often without commentary or interruption. Even though the clips were short – ranging from a few seconds to a minute, many were “the heart” of the original shows, including the moments when Elvis sang his most famous songs.





THE EVER-LENGTHENING COPYRIGHT TERM SEEMS TO BE HAVING THE OPPOSITE EFFECT FROM WHAT THE CONSTITUTION INTENDED ...

1798

2018

2038

2078

?



IT HINDERS ARTISTS WHO WANT TO USE OLDER WORKS, EVEN WHEN THE COPYRIGHT OWNER CAN'T BE FOUND OR A WOULDN'T CARE.



THE LONGER TERM ALSO PUTS MORE PRESSURE ON "FAIR USE."



TRADITIONALLY, WE HAD A THIN LAYER OF INTELLECTUAL PROPERTY PROTECTION SURROUNDING A LARGE AND RICH PUBLIC DOMAIN.



NOW THE BALANCE BETWEEN WHAT IS AND ISN'T PROTECTED HAS BEEN UPSET. COPYRIGHT LAW MAY NO LONGER SERVE THE INTERESTS OF CREATORS.

IT DIDN'T COVER VERY MUCH, AND IT DIDN'T COVER IT FOR VERY LONG.



I'M ALMOST AFRAID TO ASK:
WHAT ELSE IS THERE TO
WATCH OUT FOR?

WELL COPYRIGHT ISSUES ARE A
HANDFUL, BUT FILMMAKERS
MAY ALSO RUN INTO TRADEMARK
ISSUES.

WHILE COPYRIGHT LAW PROTECTS ARTISTIC
WORKS, TRADEMARK LAW PROTECTS
BRAND NAMES AND LOGOS THAT TELL CONSUMERS
WHERE PRODUCTS CAME FROM.

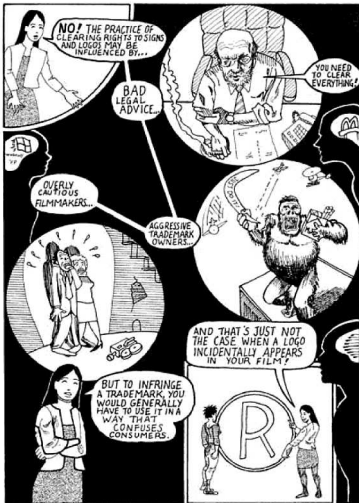
SOMETIMES IT
MAKES MY HEAD
SPIN...

EVEN WHEN IT'S
NOT REQUIRED BY
LAW, FILMMAKERS
ARE SOMETIMES
TOLD TO CLEAR
TRADEMARKS.

WHAT?

WE LIVE
IN A
LOGO
WORLD!

I CAN'T FILM WITHOUT CATCHING THEM!
DO I NEED TO BLUR OR AIRBRUSH THEM OUT?



EVEN IN FEATURE FILMS, THE USE OF TRADE MARKS TO DEPICT "REALITY" HAS BEEN PROTECTED BY COURTS.



CATERPILLAR SUED DISNEY CLAIMING THAT "GEORGE OF THE JUNGLE 2" INFRINGED ITS TRADE MARKS.



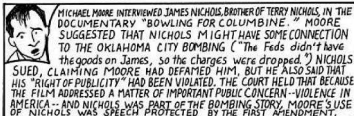
IN THE FILM, THE EVIL INDUSTRIALIST TRIES TO DESTROY GEORGE'S JUNGLE WITH "CATERPILLAR" BULLDOZERS. A FEDERAL COURT REFUSED TO BLOCK THE FILM'S RELEASE.



THE COURT SAID:

"THE APPEARANCE OF PRODUCTS BEARING WELL KNOWN TRADE MARKS IN CINEMA AND TELEVISION IS A COMMON PHENOMENON."







EVEN WHEN THE DOCUMENTARY ISN'T ABOUT SUCH CONTROVERSIAL ISSUES, SOME STATE LAWS ALLOW THE FILMMAKER TO USE A PERSON'S PICTURE WITHOUT PERMISSION IF THE SUBJECT IS "NEWS" OR "PUBLIC AFFAIRS." AND "PUBLIC AFFAIRS" CAN BE DEFINED PRETTY BROADLY.

A DOCUMENTARY ABOUT THE EARLY DAYS OF MALIBU USED SOME FOOTAGE OF FAMOUS SURFER MICKEY DORA, WHO SUED FOR UNAUTHORIZED USE OF HIS IMAGE.

THE CALIFORNIA LAW HAD AN EXCEPTION FOR PUBLIC AFFAIRS AND THE JUDGE SAID A SURFING DOCUMENTARY QUALIFIED.

"[SURFING] HAS CREATED A LIFESTYLE THAT INFLUENCES SPEECH, BEHAVIOR, DRESS, AND ENTERTAINMENT, AMONG OTHER THINGS."

TO SAY NOTHING ABOUT CREATING AN INTERGALACTIC SUPERHERO!!





WITH OR WITHOUT INSURANCE, THOUGH, SOMETIMES PEOPLE GET SCARED OUT OF USING STUFF THAT THEY HAVE A PERFECT RIGHT TO USE.



THEY MIGHT RECEIVE A "CEASE AND DESIST" LETTER WITH FAR-FETCHED CLAIMS AND DEMANDS...



AND COMPLY OUT OF FEAR OF STIFF PENALTIES OR UNCERTAINTY ABOUT THE LAW.



IF YOU RECEIVE ONE OF THESE LETTERS, YOU SHOULD GO TO www.chillingeffects.org FOR HELPFUL INFORMATION.



BILKEM & BORK LLP
MEMBER 3005
DEAR FILMMAKER:
CEASE AND DESIST!!
(OR ELSE!)

Signed
BIL BILKEM
TO WHOM IT MAY CONCERN

ALSO, FAIR USE QUESTIONS OFTEN COME UP WHEN FILMS ARE NEARING COMPLETION...



AND YOU'RE RUNNING OUT OF TIME AND MONEY!



THE LINE BETWEEN FAIR AND UNFAIR USE CAN BE FUZZY, AND LAWSUITS CAN BE EXPENSIVE AND UNPLEASANT.



SO ARTISTS MAY SHY AWAY FROM ACTS THAT ARE ACTUALLY LEGAL.



Y'KNOW, IT SOUNDS LIKE THE LAW IS SETTING UP NOTHING BUT OBSTACLES!



NOT AT ALL. IT'S THE LAW THAT GIVES YOU THE RIGHT TO CONTROL AND SELL YOUR FOOTAGE, AND ALSO GIVES YOU USERS' RIGHTS, INCLUDING FAIR USE.

HMMM... I MIGHT WANT TO SELL MY FOOTAGE TO SOMEONE MAKING A TV SHOW ABOUT NEW YORK.

... BUT I WOULDN'T EXPECT PAYMENT
IF MY DOCUMENTARY WAS PLAYING
IN THE BACKGROUND OF ANOTHER SHOT!



IF THE GOAL OF COPYRIGHT IS TO
ENCOURAGE PEOPLE TO CREATE, THEN
THESE KINDS OF RIGHTS CLEARANCES
DON'T MAKE ANY SENSE...



IS ANYONE BETTER OFF WITH ALL
THESE PAYMENTS FOR TINY FRAGMENTS
OF CULTURE?



IS THE IDEA THAT ARTISTS WON'T MAKE
FILMS OR MUSIC, UNLESS THEY
HAVE THE RIGHT TO CONTROL A
FEW SECONDS IN A DOCUMENTARY?





ACTUALLY THE
ANSWER
ISN'T
CLEAR...



OF COURSE
FILMMAKERS AND
DISTRIBUTORS SHOULD
GET PAID AND
COPYRIGHT SHOULD
PREVENT WHOLESALE
APPROPRIATION.



YOU CAN'T JUST
MAKE A FILM
ADAPTATION OF
SOMEONE ELSE'S NOVEL
OR PUT SONGS ON YOUR
SOUNDTRACK WITHOUT
PERMISSION AND
YOU SHOULDN'T
BE ABLE TO.



BUT DOCUMENTARIANS NEED TO
DEPICT A WORLD FULL OF COPYRIGHTED
CULTURE. DEMANDING PAYMENT FOR
EVERY USE CAN HINDER THE VERY
CREATIVITY THAT COPYRIGHT IS
SUPPOSED TO ENCOURAGE.



SO... I SHOULDN'T
AVOID, REPLACE
OR AIRBRUSH
EVERYTHING
OUT?



NO!
THAT WOULD
MEAN GIVING
UP
DOCUMENTARY
FILMMAKING!





YOU NEED TO UNDERSTAND
THE LAW, WHICH INCLUDES
UNDERSTANDING WHAT YOUR
RIGHTS ARE.

REMEMBER, THE COPYRIGHT
SYSTEM ALLOWS YOU TO PROTECT
YOUR WORK, **BUT** ALSO HAS
IMPORTANT LIMITATIONS THAT
ALLOW YOU TO CREATE IN
THE FIRST PLACE.

FAIR
USE --
USE IT OR
LOSE IT!!

TO PRESERVE THE
SYSTEM, WE
HAVE TO PRESERVE
FAIR USE.

ALL OF THIS INFORMATION HAS BEEN REALLY USEFUL. WHEN I'M DEALING WITH RIGHTS CLEARANCE ISSUES, I'LL HAVE A MUCH BETTER IDEA OF WHAT'S GOING ON.



AND WE'VE ONLY BEEN DISCUSSING WHAT THE LAW AND PRACTICES CURRENTLY ARE -- ONE REASON THEY'RE THIS WAY IS BECAUSE PEOPLE ASSUME THAT'S WHAT ARTISTS WANT. BUT THE LAW AND THE "RIGHTS" CULTURE CAN CHANGE IF

ENOUGH ARTISTS ARE UNHAPPY WITH THEM!



WHATEVER HAPPENS YOU'VE CONVINCED ME OF THIS. I'M NOT GOING TO PRODUCE AN AIRBRUSHED OR FICTIONALIZED VERSION OF THIS DOCUMENTARY!

BUT WHAT ABOUT THE BIGGER ISSUE?

WHAT KIND OF COPYRIGHT SYSTEM DO WE WANT?









I IMAGINE A RATHER
DIFFERENT KIND OF LANDSCAPE
WHERE SOME THINGS NEED
TO BE PRIVATE, BUT WE NEED
A LOT OF OPEN PUBLIC
SPACE IN BETWEEN--
SPACE THAT EVERYONE
CAN USE...

THAT'S A NICE IMAGE.
IT'S AS IF WE WERE
ZONING AN
ENVIRONMENT OF
THE MIND. WHO
WOULD WANT TO
DO WITHOUT ROADS
AND PARKS?



THE ECOLOGICAL IDEA REALLY WORKS. WHAT WE NEED HERE IS SUSTAINABLE DEVELOPMENT. WE'VE LEARNED THAT DEVELOPMENT MUST BE BALANCED WITH ENVIRONMENTAL PROTECTION. IN THE CULTURAL REALM, WE NEED TO HAVE A SIMILAR BALANCE BETWEEN WHAT IS OWNED AND WHAT IS FREE FOR EVERYONE TO USE...

A CULTURAL ENVIRONMENTALISM?



THESE SHADOWS HAVE DANCED FOR YOU FOR A FRAGMENT OF TIME.



PERHAPS SOMETHING IN THEIR WORDS HAS CAUGHT YOUR ATTENTION, TAUGHT YOU SOMETHING, GIVEN YOU AN IDEA?



BUT NOW THEIR MOMENT IN THE LIGHT IS OVER.



UNTIL THE NEXT TIME WE MEET, ALL THAT IS LEFT IS...



SILENCE.

Afterword

The True Story of *Bound By Law*:

(or 'Why Three Stodgy Academics Wrote a Comic Book')

James Boyle

The authors of this book are frequent, and for the most part, appreciative users of the law of copyright. Keith trained as an artist, has published several comic books and many scholarly articles, and is the bass player for The Garden Weasels - a band that is generally described as being "pretty good considering it is made up entirely of law professors." Apart from her academic work, Jennifer is also a pianist, filmmaker and short story writer. James has written books and numerous articles, and is a columnist for the *Financial Times* online. He also serves on the Board of Creative Commons, a non-profit organization that provides simplified copyright tools for artists and creators. We have all authored copyrighted works, cashed royalty checks, and benefitted from the ability to make "fair use" of copyrighted material in our own creations, whether artistic or scholarly. And we are all also scholars and teachers of copyright law - studying its history, its goals, its constitutional basis, and its impact on the arts. In the process, we have come to admire the way that copyright law has adapted to new media and new technologies through history, maintaining its balance between the realm of ownership and the realm of the public domain - where material is free for all to use without permission or fee. So count us as stodgy believers in the copyright system, not revolutionaries eager to scrap the whole thing.

But from the depths of our stodginess comes this little message - the system appears to have gone astray, to have lost sight of its original goal. Does anyone believe that



"the progress of science and the useful arts" is furthered by requiring documentary filmmakers to clear every fragment of copyrighted material caught in their films - even a copyrighted ring-tone on a phone, or a fleeting fragment of TV in the background of a shot? To be fair, in many - perhaps most - cases these demands for payment or clearance have nothing to do with copyright law as it stands. Instead, they are a



manifestation of a "permissions culture" premised on the belief that copyright gives its owners the right to demand payment for every type of usage, no matter its length, or its purpose, or the context in which it is set. But that is not, and never has been the law. Copyright may also be adjusting poorly to a world in which everyone can have their own digital printing press; the citizen publishers of cyberspace, the young digital artists, filmmakers and musicians, are unlikely to have high-priced lawyers advising them. The flourishing of digital media has been seen by policymakers mainly as a threat - as the rise of a "pirate culture of lawlessness." That threat is real. But what is missing is a sense of the corresponding opportunity.



Copyright is not an end in itself. It is a tool to promote the creation and distribution of knowledge and culture. What could be a better manifestation of this goal than a world in which there are few barriers to entry, where a blog can break a major political scandal, a \$218 digital film can go to the Cannes Film Festival, a podcast can reach tens of thousands of listeners, a mash-up can savagely criticize the government's response to a hurricane, where recording and remixing technology better than anything Phil Spector ever had may come bundled free with your laptop? Yet for many of these new digital creators, copyright appears more



as an obstacle than as an aid. Sometimes - as with many of the examples we described in this comic book - that may be the result of simple misinformation, a culture of fear and legal threats, or private gatekeepers using copyright law as an excuse to impose deals on artists who lack the information and power to protest. At other times, it seems the law genuinely has lost its internal balance and needs to be reformed - one example might be the extraordinary retrospective

lengthening of the copyright term. Just as the digital revolution allows us to offer cheap access to the texts, movies, music and images of the twentieth century, we have extended the length of copyright terms so that most of those cultural artifacts are off limits, even though they are commercially unavailable and their authors cannot be found. But if copyright has sometimes failed, or been applied so that it fails, the answer is not to ignore it, to lose respect for it, to violate it.

One of the under-appreciated tragedies of the permissions culture is that many young artists only experience copyright as an impediment, a source of incomprehensible demands for payment, cease and desist letters, and legal transaction costs. Technology allows them to mix, to combine, to create collages. They see law as merely an obstacle. This is a shame because copyright can be a valuable tool for artists and creators of all kinds - even



for many of those who are trying to share their work without charge. Copyright can work in the culture of mash-ups, parodies and remixes, of hypertext links and online educational materials. But it can do so only if we do not let the system slide further out of balance.

We thought about how to present these messages to an audience of artists and filmmakers, how to pass on the information that they need to make the system work for them. But at the same time we wanted to reach a wider audience – an audience of citizens and policymakers who generally hear nothing about copyright except the drumbeat of “Piracy! Piracy! Piracy!” The story of documentary film is vitally important in its own right. Documentaries are the most vivid visual record of our history, our controversies and our culture. But their story is also a manifestation of a wider problem and one that we thought could enrich the public debate on the subject.

For some strange reason, none of our intended audiences seem eager to read scholarly law review articles. What’s more, there is something perverse about explaining an essentially visual and frequently surreal reality in gray, lawyerly prose. Finally, what could better illustrate the process we describe than a work which has to feature literally hundreds of copyrighted works in order to tell its story, a living exercise in fair use? Hence this book. It is the first in a series from Duke’s Center for the Study of the Public Domain dealing with the effects of intellectual property on art and culture. We hope you enjoy it. For those who are interested in the wider debate on the ownership and control of science and knowledge, or the ideas behind “cultural environmentalism,” links to other resources are given on the next page.



Center for the Study of the Public Domain

Duke Law School <http://www.law.duke.edu/cspd>

“The mission of the Center is to promote research and scholarship on the contributions of the public domain to speech, culture, science and innovation, to promote debate about the balance needed in our intellectual property system and to translate academic research into public policy solutions.” An online version of this work is available for free at our website.

Further Reading on Intellectual Property and Culture

James Boyle, *The Second Enclosure Movement & the Construction of the Public Domain*

<http://www.law.duke.edu/pd/papers/boyle.pdf>

"It may sound paradoxical, but in a very real sense protection of the commons was one of the fundamental goals of intellectual property law. In the new vision of intellectual property, however, property should be extended everywhere - more is better. Expanding patentable and copyrightable subject matter, lengthening the copyright term, giving legal protection to 'digital barbed wire' even if it is used in part to protect against fair use: Each of these can be understood as a vote of no-confidence in the productive powers of the commons..."

Collected Papers on the Public Domain (Duke: L&CP 2003)

<http://www.law.duke.edu/journals/lcp/indexpd.htm>

"What does the public domain do? What is its importance, its history, its role in science, art, and in the building of the Internet? How is the public domain similar to and different from the idea of a commons? Is it constitutionally protected, or required by the norms of free expression? This edited collection, the first to focus on the public domain, seeks to answer these questions. Its topics range across a broad swath of innovation and creativity, from science and the Internet to music and culture jamming. Its list of authors includes prominent environmental scholars, appropriation artists, legal theorists, historians and literary critics."

Lawrence Lessig, *Free Culture* (The Penguin Press, New York 2004)

"A technology has given us a new freedom. Slowly, some begin to understand that this freedom need not mean anarchy. We can carry a free culture into the twenty-first century, without artists losing and without the potential of digital technology being destroyed... Common sense must revolt. It must act to free culture. Soon, if this potential is ever to be realized."

A Sampling of Legal Resources: These are not a substitute for legal advice. For specific legal questions please consult a lawyer.

- **Center for Social Media at American University: Best Practices in Fair Use**
<http://www.centerforsocialmedia.org/fairuse.htm> "Documentary filmmakers have created, through their professional associations, a clear, easy to understand statement of fair and reasonable approaches to fair use."
- **Chart on Rights Clearance Problems and Possible Solutions**
<http://www.law.duke.edu/cspd/pdf/docfilmchart.pdf>
- **Copyright Overview** <http://www.law.cornell.edu/wex/index.php/Copyright>
- **The Copyright Act: 17 U.S.C. §§ 101-1332**
http://www.law.cornell.edu/uscode/html/uscode17/uscode17_101_1332.html
- **Copyright and Fair Use** <http://fairuse.stanford.edu>
- **Copyright Term and the Public Domain**
http://www.copyright.cornell.edu/training/4article_Public_Domain.htm
- **United States Copyright Office** <http://www.copyright.gov>

Selected Organizations

- **Center for the Study of the Public Domain** <http://www.law.duke.edu/cspd>
The home of the Arts Project that brought you this comic.
- **Center for Social Media** <http://www.centerforsocialmedia.org>
The home of the Best Practices Statement.

- **Chilling Effects Clearinghouse** <http://www.chillingeffects.org>
Chilling Effects aims to help Internet users understand the protections that the First Amendment and intellectual property laws give to online activities, with a particular focus on cease and desist letters.
- **Creative Commons** <http://creativecommons.org>
Creative Commons builds upon the "all rights reserved" of traditional copyright to create a voluntary "some rights reserved" copyright. It is a nonprofit and all of the tools are free.
- **Electronic Frontier Foundation** <http://www EFF.org>
The premier online civil liberties organization.
- **Full Frame Documentary Film Festival** <http://www.fullframefest.org/main.html>
The leading documentary film festival in the United States. Takes place each spring in Durham, North Carolina.
- **Motion Picture Association of America** <http://www.mpa.org>
Founded in 1922, the MPAA is the trade association of the American film, video and television industry.
- **Public Knowledge** <http://www.publicknowledge.org>
Representing the public interest in intellectual property policy.
- **Volunteer Lawyers for the Arts** <http://www.vlany.org>
VLA provides *pro bono* legal services, and educational programs, to the arts community in New York and beyond.

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Bound By Law grew out of a conference on the effects of intellectual property law on music and film, which was held in conjunction with the Full Frame Documentary Film Festival. Both the conference and the production and distribution of this book were made possible by a grant from the Rockefeller Foundation. Other support was also provided by the Center for the Study of the Public Domain and by the Office of the President, Duke University.

Debts of gratitude are owed to many people: At Duke, to Garrett Levin, David Lange, Richard Riddell, Eileen Wojciechowski, Jordi Weinstock, Wayne Miller, Nick Drury, Jennifer Carpenter, Scott Lenger and Hiroki Nishiyama. In the filmmaking community Chris Hegedus, Orlando Bagwell and Davis Guggenheim gave us vital material while John Sloss offered a unique legal perspective. Laurie Racine and Joan Shigekawa offered vital support. Peter Jaszi and Pat Aufderheide's work on fair use was invaluable. Larry Lessig's work provided the impetus to focus on documentary film and his scholarship is a vital resource in outlining problems in the area. Along the way, others supplied key encouragement or advice. Thanks to Cory Doctorow, Sham B., Brandt Goldstein, Megan Taylor, the people at Full Frame, and everyone else who made this project possible. Mona Aoki deserves special mention for patience verging on the saintly.

About the Authors

This book was written by James Boyle and Jennifer Jenkins, designed by all of its authors in innumerable, hilarious and occasionally manic conference calls, and drawn by Keith Aoki, a person who (in the opinion of his co-authors) is far too talented to be a law professor.

Keith Aoki is a longtime cartoonist who loves the late 1960s comic work of Jack Kirby, Steve Ditko, Jim Steranko and earlier greats like Will Eisner, Chester Gould and Al Capp. He has also been influenced by the vibrant contemporary work of Robert Crumb, Scott McCloud, Art Spiegelman and Jamie Hernandez. In the mid-1980s, Aoki decided to leave the bohemian art demimonde to go to Harvard Law School. He is now the Philip H. Knight Professor of Law at the University of Oregon School of Law, where he has taught since 1993 and specializes in the area of intellectual property. He has published law review articles in the *Stanford*, *California*, *Iowa* and *Boston College Law Reviews* and is author of the forthcoming book *Seed Wars: Cases and Materials on Intellectual Property and Plant Genetic Resources*.

James Boyle is the William Neal Reynolds Professor of Law at Duke Law School and one of the founders of the Center for the Study of the Public Domain. He is a Board Member of Creative Commons, and a columnist for the online *Financial Times*. Boyle was the winner of the 2003 World Technology Award for Law for his work on the "intellectual ecology" of the public domain, and on the "second enclosure movement" that threatens it. He is the author of *Shamans, Software and Spleens: Law and the Construction of the Information Society* as well as a depressingly large number of law review articles, and is the special editor of *Collected Papers on the Public Domain*.

Jennifer Jenkins is Director of Duke's Center for the Study of the Public Domain, where she heads its "Arts Project" and teaches a seminar on Intellectual Property, the Public Domain and Free Speech. As a lawyer, she was a member of the team that defended the copyright infringement suit against the publisher of the novel "The Wind Done Gone" (a parodic rejoinder to "Gone With the Wind"). As an artist, she co-authored "Nuestra Hernandez," a fictional documentary addressing copyright and appropriation, and has authored several short stories, one of which was published in Duke's Tobacco Road literary magazine.

Inquiries about the book? Send press, book review, and other inquiries to: cspd@law.duke.edu .

Bulk orders? Educational and other bulk users can order 50 or more copies for classes or conferences at a discounted rate. See www.law.duke.edu/cspd/comics for more information on placing bulk orders.

What's next? Keep up with the activities of the Center for the Study of the Public Domain, including our next comic book on intellectual property and music, by visiting www.law.duke.edu/cspd .

The Center for the Study of the Public Domain is a non-profit organization.

A documentary is being filmed. A cell phone rings, playing the "Rocky" theme song. The filmmaker is told she must pay \$10,000 to clear the rights to the song. Can this be true? "Eyes on the Prize", the great civil rights documentary, was pulled from circulation because the filmmakers' rights to music and footage had expired. What's going on here? It's the collision of documentary filmmaking and intellectual property law, and it's the inspiration for this comic book. Follow its heroine Akiko as she films her documentary, and navigates the twists and turns of intellectual property. Why do we have copyrights? What's "fair use"? *Bound By Law* reaches beyond documentary film to provide a commentary on the most pressing issues facing law, art, property and an increasingly digital world of remixed culture.

Advance Praise for Bound By Law

"Will a spiky-haired, camera-toting super-heroine... restore decency and common sense to the world of creative endeavor?... [*Bound By Law*] exercises the fair-use doctrine in a romp through popular culture." -Paul Bonner, *The Herald-Sun*

"Bound by Law? stars Akiko, a curvaceous, muscular filmmaker (think Tomb Raider's Lara Croft with spiky hair) planning to shoot a documentary about a day in the life of New York City... [It] translates law into plain English and abstract ideas into 'visual metaphors.' So the comic's heroine, Akiko, brandishes a laser gun as she fends off a cyclopean 'Rights Monster' - all the while learning copyright law basics, including the line between fair use and copyright infringement." -Brandt Goldstein, *The Wall Street Journal online*

"Bound By Law" riffs expertly on classic comic styles, from the Crypt Keeper to Mad Magazine, superheros to Understanding Comics, and lays out a sparkling, witty, moving and informative story about how the eroded public domain has made documentary filmmaking into a minefield." -Cory Doctorow, *BoingBoing.net*

For more information, and free digital versions of this book, please visit www.law.duke.edu/cspd/comics

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